In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND
DAIRY EMPLOYEES UNION,
Local 336, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONERS.

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Authorities Cited.

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REPLY BRIEF OF PETITIONERS.

I.

THE SCHEME OF THE RESPONDENTS INVOLVED BOTH AN ILLEGAL PURPOSE AND AN ILLEGAL EFFECT.

Respondents contend that their ultimate object having been for the betterment of the members of the Union, their action was lawful. Such purposes do not make an unlawful combination or conspiracy lawful, or an illegal means legal.

Bedford Cut Stone Co. vs. Stone Cutters Assoc., 274 U. S. 37;
Duplex Printing Press Co. vs. Deering, 254 U. S. 443;
Loewe vs. Lawler, 208 U. S. 274.

Their argument that the agreement was designed to help the members of the defendants' Union and not hurt the petitioners' business is specious in the light of the established facts. The elimination of the brokers and the destruction of their business was one of the prime objects of this group. The statements of Rohrich, Hynes, Margo, Union representatives and those of Manfredi and Baxter, dairymen, referred to in the Petition for Writ of Certiorari,

pages 6 to 9, and in the Narrative Statement (N. S. 16, 17), indicate clearly a studied effort and purpose of both the Union and the dairies to destroy these independent business men, eliminate this "evil" and thereby benefit themselves. The annihilation and destruction of the Petitioners' business was the *sine qua non* of the whole scheme, and referring to them derisively as "peddlers" in their briefs does not enhance the defendants' position or minimize that of the petitioners.

Neither Tellings nor the Union deny the effect of this agreement, but both attempt to justify it. In doing so they rely upon *Senn v. Tile Layers Union,* 301 U. S. 468, and on *National Fireproofing Co. v. Mason Builders Association,* 169 Fed. 259. In the *Senn* case the question involved was whether the Wisconsin "picketing" statute as construed and applied by the courts of the State of Wisconsin violated the 14th Amendment to the United States Constitution. It was upon this ground that the Supreme Court took jurisdiction, and supports our position that there exists a substantial Federal constitutional question in the case at bar.

In discussing the substantive questions involved, the Court pointed with approval to the provisions of the Wisconsin statute differentiating legal from illegal labor union activities, specifically proscribing secondary boycotts, as follows:

> "The statute provides that the picketing must be peaceful and that the term as used implies not only absence of violence but absence of any unlawful act; it precludes the intimidation of customers; it precludes any form of physical obstruction or interference with Plaintiffs' business; it authorizes giving publicity to the existence of the dispute, 'whether by advertising, patroling any public streets or places where any person or persons may lawfully be; but precludes misrepresentation of the facts of the controversy, *and it declares that, "nothing herein shall be construed to legalize a secondary boycott."* See *Duplex Printing*

Press Co. v. Deering, 254 U. S. 443, 466, 65 L. ed. 349, 356, 41 Supreme Court 172, 16 A. L. R. 196. Inherently the means authorized are clearly unobjectionable.' ''

Since the question of picketing is not involved in the case at bar but boycotting is, and since this Court has referred to *Duplex Printing Press v. Deering* with evident reaffirmation, we submit that the *Senn* case supports the contention of the petitioners rather than giving solace to the respondents.

The *National Fireproofing* case, *supra*, a Federal Circuit Court decision decided in 1909 enunciates a principle which was repudiated by this Court in 1921 in *Duplex Printing Press Co. v. Deering.*

In the *Duplex* case, a secondary boycott has been defined as:

> ''A combination not merely to refrain from dealing with complainant or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott') but to exercise coercive pressure upon such customers, actual and prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.''

If it be true, as Tellings and the Union contend, that the milk distributors had to accept the demands of the Union not to sell to the brokers upon the threat of strike, which they feared would cause them loss or damage, then clearly coercive pressure was exercised upon these dealers not to deal with brokers, actual or prospective, thereby meeting squarely this Court's definition and disapproval of a secondary boycott.

In *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418, 439, this Court enunciated the doctrine applicable here in words as follows:

> ''But the very fact that it is lawful to form these bodies (labor unions), with multitudes of members means that they have thereby acquired vast power in

> the presence of which the individual may be helpless. This power when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifices of rights protected by the Constitution, or by standing on such rights and appealing to the preventful powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

Had there been a sincere desire not to engage in a scheme involving a boycott of small competitors, Tellings and the other dealers could have found in the above pronouncement by the Supreme Court legal as well as moral justification for their refusal to become participants in such a venture. Public opinion, as well as the courts, would not have tolerated a labor union's demands predicated upon the destruction of a group of individual business men who earn their livelihood through their own labors. But the will was not there. One of the dealers, Manfredi, told why. It was he who asserted that the broker must buy bottled milk, and if he were eliminated by this agreement, the price of milk would be "stabilized" and competition eliminated. (N. S. 18.) It was he who said that if this provision were not in the agreement he would not have entered into it. (N. S. 17.) Manfredi had the forthrightness to tell the Court what he thought.

It is significant that membership in the Union was closed to the brokers; their obtaining a supply elsewhere was made impossible and the opening of a cooperative dairy, it was agreed, would not be tolerated. By Article I, Paragraph 3 of Exhibit 3, even those brokers from whom the Union at the time of the negotiations was accepting dues, constituted a conflict in membership and provided that "proper action will be taken by the Union to correct such conflict in membership." Not only was the Union thereby closed to brokers who might seek its membership, but such as were already members would be eliminated. (Such was and is today the purpose of this group.)

If the dealers were coerced into this scheme, such action constituted a secondary boycott and was therefore in violation of the state anti-trust law. If, on the other hand, they were not coerced, then they entered into an unlawful conspiracy to accomplish the same purpose in violation of the anti-trust laws and the petitioners should have been given the benefit of the act by the court below. In either event, failure by the court to do so deprived them of property and denied them rights guaranteed by the 14th Amendment to the United States Constitution as regards equal protection and due process.

II.

SINCE THE ACTION OF THE RESPONDENTS CAN AND IN ALL PROBABILITY WILL BE REPEATED, THE QUESTION IS NOT MOOT.

Where it lies within the power of the defendants to repeat the acts complained of, the question is not moot.

Southern Pacific Terminal Co. v. Interstate Commerce Com., 219 U. S. 498;

Federal Trades Commission v. Goodyear Tire & Rubber, 304 U. S. 357;

Miller v. Lutheran Conference & Camp Assoc., 200 Atl. 646, 649, 331 Pa. 241.

In view of the fact that counsel for Tellings has made the claim that on the day preceding the filing of its brief the Union gave it and all other milk dealers notice of the expiration of the agreement, and has thus brought into this case matters extraneous to the Record, we regretfully find it necessary by way of defense to call the Court's attention to matters bearing upon this issue, so that it may be fully advised in the premises.

In September, 1939, when this cause was before the Court of Appeals for Cuyahoga County, the same claim was made; in fact the Union named fifty to sixty dairy owners whose contracts it was claimed had expired at the date of

hearing in October, 1939. The contract is self-perpetuating but can be made inoperative by either party giving thirty days notice prior to its expiration on September 30 of each year. The petitioners then claimed that irrespective of these fifty or sixty named dairies the contract at least insofar as it concerned brokers was nevertheless in force. Upon the denial of the bill for an injunction by the Court of Appeals, the following letter was mailed to dealers among whom were those with whom it was claimed the Union had no agreement:

"Milk and Ice Cream Drivers and Dairy
Employees Union Local No. 336
of the I. B. of T. C. S. and H. of A.
Affiliated with
American Federation of Labor, Ohio State Federation
of Labor and Cleveland Federation of Labor
1030 Sumner Avenue Cleveland, Ohio
Jan. 23, 1940

Dear Sir:

We wish to call your attention to Article XXXIV of the contract, which is as follows:

'The Employer further agrees that beginning May 1st, 1938, the distribution and sale of dairy products shall be carried on exclusively by members of said Local No. 336. This does not include emergency deliveries or sales through retail outlets owned by the Employer or the employment directly by the dairy of solicitors, salesmen and collectors who do not have delivery duties.'

Enforcement of this section of the contract was prevented due to the fact that a number of brokers commenced a lawsuit in the Common Pleas Court, and were granted a temporary injunction restraining the Union and the employers from complying with the terms of the above mentioned Section XXXIV.

The Court of Common Pleas held against the brokers who then appealed to the Court of Appeals of Cuyahoga County. On the twenty-third day of December, 1939, the Court of Appeals handed down a final decision refusing to interfere with the enforcement of this section of the contract.

The Union will now insist upon the compliance with this term of this section of the contract by March 1, 1940.

Very truly yours,

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, LOCAL NO. 336,

LEO W. MARGO,

Secretary."

If any evidence were needed as to the future intentions of these respondents, this amply supplies the proof. We are thus brought within the holdings that where the controversy may again arise, the question is not moot and the Court may give redress. As said in *Miller v. Lutheran Conference and Camp Association, supra,* Syl. 2—

> "An appeal from a decree enjoining trespasses of property was not dismissible on the ground that appellant had discontinued trespasses which were the subject of the bill where the controversy might flare up again if appellant obtained another license for boating, bathing and fishing purposes which constituted the trespass."

III.

FACTUALLY AND UPON PRINCIPLE THE COMBINATION IS NOT JUSTIFIABLE.

Throughout the factual statement of the case as set forth in the Brief of the Telling Belle Vernon Company, an attempt is made to justify the combination of the Union and Employers to deprive three hundred small business men of their means of earning a livelihood. The argument propounded is as follows:

> The Union wanted impossible terms, namely, the payment of a flat weekly wage. The employers refused to pay it. Therefore, the matter was settled by destroying the business of third persons, non-employees, by shutting off their supply of bottled milk.

The fact that Rohrich, the Union spokesman, stated he was interested in more than wages for his men, namely having "prices leveled" (R. 756—N. S. 107, 108); that the Union was willing to accept responsibility for such action (R. 754—N. S. 105, 106); that Sechler, another Union representative, stated "the Union was trying to make conditions better for (the dealers) by compelling (their) competitors to do the same" (N. S. 102; R. 754) is glossed over as though it were dehors the Record. The fact that the Union boasted of its efficiency in bringing small storekeepers to time as regards the sales price of milk through picketing in cooperation with the Fraternal League of Milk Dealers and wanted something in return for such service, is totally ignored in the attempt to justify this combination.

From the argument in Telling's brief on page 16, one would be led to believe that the age of enlightenment was indeed at hand, for here the largest milk distributor in Cleveland, a part of a huge chain stretching from coast to coast, is heard to advocate labor's right to freedom of contract with respect to the sale of its services as being equal to the owner's right to dispose of property. Strange circumstances sometimes evoke humorous incongruities in advocacy. This is an example of it. Surely such statement must have been made by this corporation with its figurative tongue in its cheek. The Telling Belle Vernon Company is the corporation which in 1922 engaged in what Mr. Corrigan in his brief on behalf of the Union says was a "disastrous strike" resulting in wiping the milk drivers union "out of existence." (p. 2, Brief of Union.) This is the same company which in 1936 engaged in a scheme of price fixing and monopoly practices, which were condemned and enjoined by the Nisi Prius Court in Cuyahoga County in *Clover Meadow Creamery Co. v. National Dairies, et al.*, 29 O. N. P. N. S. 243. This is the company which refused to meet the demands of the Union for a reasonable flat weekly wage in 1937, which, if granted, would have avoided the threatened strike, upon which it relies so heavily as a

defense, and would have precluded the present charges of monopoly and price fixing which are leveled against it. This corporation is now heard to champion the cause of labor.

But by the payment of a weekly wage the scheme to monopolize and fix the price of milk in Cleveland could not have been made effective. Such method of paying wages would have deprived the defendant company and others in the same position of Clause 25 of the agreement which fixed the retail price of milk at 12¢ per quart and the wholesale price at 10¢ per quart. This, Mr. Jones, the sales manager of Tellings, reluctantly admitted would put the dealer who paid commission to the driver on the basis of 12¢ per quart while charging 11¢ at a disadvantage. No strenuous argument is needed to indicate what a deterrent this would be to underselling. In the light of the past history of this company and other defendant dealers as set forth in the *Clover Meadow* case, *supra,* and in the light of statements made by Messrs. Rohrich, Hynes, Baxter, Manfredi and others found in the Narrative Statement and referred to in our petition (pages 6 to 9 and N. S. 16, 17) we submit that Tellings takes this position because there is no other way of escape.

"By their fruits ye shall know them."

The Union claims a superior right to the independent entrepreneur. Its argument is that since the demand for a closed shop is legally permissible it has a right to strike for it and to destroy the business of independent business men, non-employees, who earn their livelihood through their own labors. This Court we submit has held the contrary in *Duplex Printing Press v. Deering; Bedford Cut Stone v. Stone Cutters Association,* 274 U. S. 37; and *U. S. v. Brims.* On principle, by what process of reasoning can the Union claim its rights to be superior to those of the broker? The truck which the broker owns, the good will he creates are as much his stock in trade as are the services of the em-

ployee for which Tellings as well as the Union now plead. Surely, a doctrine which would permit the existence of one group of workingmen upon the correlative destruction of another and similar group would be as dangerous as it would be inherently unjust. No one can deny the Union's right to demand and obtain a living wage for its members. This is provided for in the contract as is also the "closed shop." (Paragraph 1, Article 1, Ex. 3.) The effort to go beyond that, to make it impossible for non employees to obtain a supply of milk and thereby drive them out of business shifts the real conflict between the advertising dairy and the broker, to a pretended conflict between the broker and the Union driver, and makes such effort unjustifiable and illegal.

The defense is made that since each dealer had the privilege of refusing to deal with the petitioners the group could do likewise. This Court held the contrary in *Granada Lumber Co. v. Mississippi,* 217 U. S. 433, where it said:

> "An act harmless when done by one may become a public wrong when done by many acting in concert."

To the same effect *Restatement of the Law of Torts,* Sec. 765 Rationale.

IV.

THE FEDERAL QUESTION WAS PROPERLY AND TIMELY RAISED IN THE STATE COURTS.

On page 10 of our Petition we set forth that the Federal question was raised in the Court of Appeals and thereafter in the Supreme Court of Ohio by Assignments of Error. The question was argued in the Briefs and orally. The Supreme Court of Ohio considered the questions thus raised and rendered an adverse ruling on the ground that no debatable Federal constitutional question was involved. (*Ritter v. Union,* 136 O. S. 582.) Since then the Supreme Court of Ohio in certifying its approval of the Narrative Statement has indicated that it considered the entire testimony

in dismissing the plaintiff's appeal as of right, upon the ground that there was no debatable Federal constitutional question involved. This Court has repeatedly held this to be sufficient:

Van Huefel v. Harkelrode, 284 U. S. 225;
Titus v. Walleck, 306 U. S. 282;
Mathew v. Huwe, 269 U. S. 262.

In *City National Bank v. Durr,* 257 U. S. 99, where the petitioner raised the Federal question in the Ohio Supreme Court for the first time upon an application for a rehearing which was denied without opinion, this Court took jurisdiction by granting certiorari.

> "Whether a Federal question was adequately presented and decided in a State Court is itself a Federal question."

Lavelle v. Griffin, 303 U. S. 444;
Carter v. Texas, 177 U. S. 442, 447;
Ward v. Love, 253 U. S. 17, 23.

We respectfully submit that the matters in this cause are of great public interest and importance, that there is a substantial Federal constitutional question involved and pray that our petition be granted.

Respectfully submitted,

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